

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DURIEL DAVIS,

Plaintiff,

v.

ADVANCE SERVICES, INC., et al.,

Defendants.

No. 2:22-cv-00343-MCE-JDP

MEMORANDUM AND ORDER

Presently before the Court is a Motion to Dismiss Plaintiff Duriel Davis' ("Plaintiff") Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6)¹ filed by the following groups of Defendants: (1) Archer-Daniels-Midland Company, ADM Rice, Inc., and ADM Milling Company (collectively, "ADM Corporate Defendants"); (2) Janet Escalante (erroneously sued as Janette Escalante), Matthew House, and Johnny Barnett (collectively, the "Individual Managers"); and (3) Carlos Guerrero ("Guerrero") (erroneously sued as Carlos Guerrero) (collectively with ADM Corporate Defendants and Individual Managers, "Moving Defendants").² ECF Nos. 32 ("Moving Defs.' Mot."),
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¹ All further references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure.

² Defendant Advance Services, Inc. ("Advance") filed an Answer to the Complaint. ECF No. 7. Defendants Rush Personnel Services, Inc. ("Rush") and Omar Rosales ("Rosales") have not yet appeared in this action.

36 (“Pl.’s Opp’n”), 38 (“Moving Defs.’ Reply”). For the following reasons, that Motion is GRANTED in part and DENIED in part.³

BACKGROUND⁴

In or around late 2017, Plaintiff, who is African American, began working for Advance and/or ADM Corporate Defendants and/or Rush in Woodland, California, and is still employed by them. Plaintiff alleges that since early 2019, he has been subjected to a continuing series of similar and related discriminatory, harassing, and/or retaliatory actions by all Defendants because of his race and/or Defendants’ perception of Plaintiff’s race and/or because Plaintiff complained of and opposed unlawful actions that were taken against him because of his race.

For example, in February 2019, Plaintiff alleges that his foreman/supervisor Guerrero fashioned a noose out of a piece of rope, presented the noose to Plaintiff, pretended to hang himself by the neck with it, and told Plaintiff, “This is for you.” On September 23, 2020, Plaintiff alleges that his co-worker Rosales did the same thing by fashioning a noose out of a piece of rope and telling Plaintiff, “It’s for you.” Another incident allegedly occurred in June 2020, when Guerrero pointed Plaintiff out to another employee, who was looking for a brownie Guerrero was supposed to bring for lunch, and told the employee, “There is your brownie,” in reference to Plaintiff. A few months later, in October 2020, Plaintiff alleges he was demoted from the shipping department to the sanitation department because of his race and/or as retaliation for Plaintiff’s reporting of discriminatory, harassing, and/or retaliatory conduct.

More generally, Plaintiff alleges that between June 2020 and the present, all Defendants (1) ignored Plaintiff; (2) spoke in other languages to exclude Plaintiff from

³ Because oral argument would not have been of material assistance, the Court ordered this matter submitted on the briefs. E.D. Local Rule 230(g).

⁴ Unless otherwise noted, the following recitation of facts is taken, primarily verbatim, from Plaintiff’s Complaint. ECF No. 1 (“Compl.”).

1 conversations, including work-related conversations and information; (3) accused
2 Plaintiff of work-related and other misconduct; and (4) singled out Plaintiff for punishment
3 and/or discipline. Regarding the above events, Plaintiff claims that the Individual
4 Managers had actual and/or constructive knowledge of this conduct but they failed to
5 take all reasonable steps to prevent this conduct from occurring and take immediate and
6 appropriate corrective action. Finally, Plaintiff alleges that all Defendants aided and
7 abetted this harassing and retaliatory conduct by offering encouragement and/or
8 assistance to the perpetrator(s).

10 STANDARD

12 On a motion to dismiss for failure to state a claim under Rule 12(b)(6), all
13 allegations of material fact must be accepted as true and construed in the light most
14 favorable to the nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337–38
15 (9th Cir. 1996). Rule 8(a)(2) “requires only ‘a short and plain statement of the claim
16 showing that the pleader is entitled to relief’ in order to ‘give the defendant fair notice of
17 what the . . . claim is and the grounds upon which it rests.’” Bell Atl. Corp. v. Twombly,
18 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). A
19 complaint attacked by a Rule 12(b)(6) motion to dismiss does not require detailed factual
20 allegations. However, “a plaintiff’s obligation to provide the grounds of his entitlement to
21 relief requires more than labels and conclusions, and a formulaic recitation of the
22 elements of a cause of action will not do.” Id. (internal citations and quotations omitted).
23 A court is not required to accept as true a “legal conclusion couched as a factual
24 allegation.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at
25 555). “Factual allegations must be enough to raise a right to relief above the speculative
26 level.” Twombly, 550 U.S. at 555 (citing 5 Charles Alan Wright & Arthur R. Miller,
27 Federal Practice and Procedure § 1216 (3d ed. 2004) (stating that the pleading must

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1 contain something more than “a statement of facts that merely creates a suspicion [of] a
2 legally cognizable right of action”).

3 Furthermore, “Rule 8(a)(2) . . . requires a showing, rather than a blanket
4 assertion, of entitlement to relief.” Twombly, 550 U.S. at 555 n.3 (internal citations and
5 quotations omitted). Thus, “[w]ithout some factual allegation in the complaint, it is hard
6 to see how a claimant could satisfy the requirement of providing not only ‘fair notice’ of
7 the nature of the claim, but also ‘grounds’ on which the claim rests.” Id. (citing Wright &
8 Miller, supra, at 94, 95). A pleading must contain “only enough facts to state a claim to
9 relief that is plausible on its face.” Id. at 570. If the “plaintiffs . . . have not nudged their
10 claims across the line from conceivable to plausible, their complaint must be dismissed.”
11 Id. However, “a well-pleaded complaint may proceed even if it strikes a savvy judge that
12 actual proof of those facts is improbable, and ‘that a recovery is very remote and
13 unlikely.’” Id. at 556 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

14 A court granting a motion to dismiss a complaint must then decide whether to
15 grant leave to amend. Leave to amend should be “freely given” where there is no
16 “undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice
17 to the opposing party by virtue of allowance of the amendment, [or] futility of [the]
18 amendment” Foman v. Davis, 371 U.S. 178, 182 (1962); Eminence Capital, LLC v.
19 Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (listing the Foman factors as those to
20 be considered when deciding whether to grant leave to amend). Not all of these factors
21 merit equal weight. Rather, “the consideration of prejudice to the opposing party . . .
22 carries the greatest weight.” Id. (citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183,
23 185 (9th Cir. 1987)). Dismissal without leave to amend is proper only if it is clear that
24 “the complaint could not be saved by any amendment.” Intri-Plex Techs., Inc. v. Crest
25 Group, Inc., 499 F.3d 1048, 1056 (9th Cir. 2007) (citing In re Daou Sys., Inc., 411 F.3d
26 1006, 1013 (9th Cir. 2005); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th
27 Cir. 1989) (“Leave need not be granted where the amendment of the complaint . . .
28 constitutes an exercise in futility”)).

ANALYSIS

The Complaint asserts the following Claims for Relief: (1) Racial Discrimination in Violation of 42 U.S.C. § 1981 (“§ 1981”) against Advance, ADM Corporate Defendants, and Rush; (2) Racial Discrimination in Violation of California’s Fair Employment and Housing Act, California Government Code §§ 12940 et seq. (“FEHA”), against Advance, ADM Corporate Defendants, and Rush; (3) Harassment Based on Race in Violation of FEHA against all Defendants; (4) Retaliation in Violation of FEHA against all Defendants; and (5) Failure to Prevent and Cure Harassment and Discrimination in Violation of FEHA against Advance, ADM Corporate Defendants, and Rush. See Compl., at 6–10. Moving Defendants seek dismissal of all claims asserted against them on the basis that Plaintiff fails to state a claim upon which relief may be granted.⁵ The Court will address each of the claims in turn.

A. First and Second Claims for Relief: Racial Discrimination in Violation of § 1981 and FEHA Against ADM Corporate Defendants

Section 1981 provides that “[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . .” 42 U.S.C. § 1981(a). “To establish his initial prima facie case of race discrimination, [Plaintiff] must show that: (1) he is a member of a protected class; (2) he was qualified for his position; (3) he experienced an adverse employment action; and (4) similarly situated individuals outside his protected class were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination.” Morrow v. City of Oakland, No. C 11-02351 LB, 2012 WL 2133755, at *10 (N.D. Cal. June 12, 2012); see Fonseca v. Sysco Food Servs. of Ariz.,

⁵ Moving Defendants moved to dismiss the First, Second, and Fifth Claims for Relief against all of them, but Plaintiff confirmed in his Opposition brief that those claims are not asserted against the Individual Managers or Guerrero. See Pl.’s Opp’n, at 6–7, 9.

1 Inc., 374 F.3d 840, 850 (9th Cir. 2004) (“Analysis of an employment discrimination claim
2 under § 1981 follows the same legal principles as those applicable in a Title VII
3 disparate treatment case.”).

4 Similarly, FEHA prohibits, in part, an employer from discriminating against an
5 employee “in compensation or in terms, conditions, or privileges of employment” on the
6 basis of race. See Cal. Gov’t Code § 12940(a). “To state a prima facie case of
7 discrimination under the FEHA, a plaintiff must allege and ultimately show that: (i) [he]
8 was a member of a protected class; (ii) [he] was qualified for the position [he] sought or
9 was performing competently in the position [he] held; (iii) [he] suffered an adverse
10 employment action; and (iv) the employer acted with a discriminatory motive.” Ayala v.
11 Frito Lay, Inc., 263 F. Supp. 3d 891, 905 (E.D. Cal. 2017).

12 At issue here is whether Plaintiff suffered an adverse employment action. See
13 Davis v. Team Elec. Co., 520 F.3d 1080, 1089 (9th Cir. 2008) (under Title VII, “an
14 adverse employment action is one that ‘materially affect[s] the compensation, terms,
15 conditions, or privileges of . . . employment.’”) (citation omitted) (alterations in original);
16 Ayala, 263 F. Supp. 3d at 905 (adverse employment actions under FEHA include
17 “termination, demotion, failing to promote, denial of an available job, adverse job
18 assignments, official discipline, and significant changes in compensation or benefits.”).
19 Plaintiff alleges, in part, that (1) his move from the shipping department to the sanitation
20 department constituted a demotion, (2) he was accused “of work-related and other
21 misconduct,” and (3) he was “singl[ed] [] out for punishment and/or discipline.” Compl.
22 ¶¶ 26(d)–(e). As a result, Plaintiff claims he “suffered actual damages, including lost
23 income, benefits, promotional and career opportunities.” Id. ¶¶ 29, 34.

24 Moving Defendants argue that Plaintiff fails to allege why any of these actions are
25 adverse. See, e.g., Moving Defs.’ Mot., at 17 (“Plaintiff does not allege a difference in
26 pay or benefits from the Shipping Department to the Sanitation Department, or a
27 difference in any other condition, so as to support his conclusory statement that the
28 move was ‘a demotion.’”). However, adverse employment actions “are not limited only to

1 so-called ultimate employment actions such as termination or demotion, but also the
 2 entire spectrum of employment actions that are reasonably likely to adversely and
 3 materially affect an employee's job performance or opportunity for advancement in his or
 4 her career." Hicks v. Netflix, Inc., 472 F. Supp. 3d 763, 775 (C.D. Cal. 2020) (citing
 5 Yanowitz v. L'Oreal USA, Inc., 36 Cal. 4th 1028, 1054 (2005)) (internal quotation marks
 6 omitted). Viewing the Complaint as a whole and accepting the allegations as true, the
 7 Court can reasonably infer, at this stage, that the department change, accusations of
 8 workplace misconduct, and being subjected to discipline materially affected Plaintiff's
 9 employment and opportunity for advancement. Therefore, Moving Defendants' Motion to
 10 Dismiss the First and Second Claims for Relief is DENIED.

11 **B. Third Claim for Relief: Harassment Based on Race in Violation of**
 12 **FEHA Against Moving Defendants**

13 "To establish a prima facie claim for harassment and hostile work environment
 14 under the FEHA, a plaintiff must allege and demonstrate that: (i) [he] is a member of a
 15 protected group; (ii) [he] was subjected to harassment because [he] belonged to this
 16 group; and (iii) the alleged harassment was so severe or pervasive that it created a
 17 hostile work environment." Ayala, 263 F. Supp. 3d at 909–10. "Courts consider the
 18 totality of the circumstances in evaluating whether a hostile work environment exists,
 19 including 'the frequency of the discriminatory conduct[;] its severity[;] whether it is
 20 physically threatening or humiliating, or a mere offensive utterance; and whether it
 21 unreasonably interferes with an employee's work performance.'" Id. at 910 (quoting
 22 Miller v. Dep't of Corr., 36 Cal. 4th 446, 462 (2005)).

23 **1. Individual Managers**

24 Plaintiff seeks to hold the Individual Managers liable under an aiding and abetting
 25 theory of harassment. See Pl.'s Opp'n, at 6 (citing, in part, Smith v. BP Lubricants USA
 26 Inc., 64 Cal. App. 5th 138, 146 (2021) (stating "individuals and entities who are not the
 27 plaintiff's employer may be liable under FEHA for aiding and abetting the plaintiff's
 28 employer's violation of FEHA.")). On the other hand, Moving Defendants argue that

1 “employees may be held personally liable for any harassment that they themselves have
2 committed,” and thus “liability does not extend to employees who did not engage in
3 harassing conduct.” See Moving Defs.’ Mot., at 15 (citing, in part, Fiol v. Doellstedt,
4 50 Cal. App. 4th 1318, 1326–30 (1996) (holding that “a supervisory employee is not
5 personally liable under the FEHA, as an aider and abettor of the harasser, for failing to
6 take action to prevent the . . . harassment of a subordinate employee.”)). As such,
7 Moving Defendants contend that because there are no allegations that the Individual
8 Managers personally participated in harassing conduct, this claim should be dismissed
9 against them. Under either approach, the Court finds the result is the same.

10 Here, the only specific allegations related to the Individual Managers are that they
11 “had actual and/or constructive knowledge of the actions by Defendants’ employees and
12 [they] failed to take all reasonable steps to prevent this conduct from occurring and failed
13 to take immediate and appropriate corrective action.” See, e.g., Compl. ¶ 26. Even
14 more generally, the Complaint alleges that “all Defendants, and each of them, aided and
15 abetted in this harassing and retaliatory conduct by offering encouragement and/or
16 assistance.” See id. However, Plaintiff does not allege on how each Individual Manager
17 knew about the alleged conduct or how they encouraged or assisted said conduct.
18 Furthermore, there is nothing in the Complaint indicating how the Individual Managers
19 acted in concert to harass Plaintiff. See Smith, 64 Cal. App. 5th at 146 (stating that the
20 “common basis for liability for . . . aiding and abetting . . . is concerted wrongful action.”).

21 Plaintiff also alleges that all Defendants “ignor[ed] Plaintiff, [spoke] in other
22 languages to exclude Plaintiff from conversations, including work-related conversations
23 and information, accus[ed] Plaintiff of work-related and other misconduct, and singl[ed]
24 Plaintiff out for punishment and/or discipline.” Id. ¶ 26(d). Assuming these allegations
25 pertain to the Individual Managers, they are also too conclusory because they do not
26 indicate which Individual Manager committed these acts let alone how each one
27 committed them. The Court thus cannot determine whether the actions of the Individual
28 Managers constitute as harassment.

1 Ultimately, Plaintiff's general and conclusory allegations that the Individual
2 Managers knew about and/or aided and abetted any harassment in violation of FEHA
3 are insufficient. Accordingly, Moving Defendants' Motion to Dismiss the Third Claim for
4 Relief as to the Individual Managers is GRANTED with leave to amend.

5 **2. Guerrero**

6 Plaintiff alleges two events involving Guerrero, the first one being that, in February
7 2019, he "fashioned a noose out of a piece of rope, presented the noose to Plaintiff, []
8 pretended to hang himself by the neck with the noose[,] . . . [and] told Plaintiff 'This is for
9 you'." Compl. ¶ 26(a). Second, in June 2020, Guerrero allegedly "pointed Plaintiff out to
10 another employee . . . and told the employee 'There is your brownie', in reference to
11 Plaintiff." *Id.* ¶ 26(b). Moving Defendants argue that these two incidents, which occurred
12 months apart, cannot be considered severe or pervasive to qualify as harassment. *See*
13 *Moving Defs.' Mot.*, at 18.

14 "In general, the Ninth Circuit has found that such 'isolated' incidents, occurring
15 sporadically over a long period of time, are not severe or pervasive enough to alter the
16 conditions of employment." *Henry v. Regents of the Univ. of Cal.*, 37 F. Supp. 3d 1067,
17 1085 (N.D. Cal. 2014), *aff'd*, 644 F. App'x 787 (9th Cir. 2016) ("*Henry*") (collecting
18 cases). However, "[t]he Ninth Circuit has held that '[i]f a single incident can ever suffice
19 to support a hostile work environment claim, the incident must be extremely severe,' and
20 a California court of appeals has similarly held, in a FEHA harassment case, that an
21 incident 'must be severe in the extreme and generally must include either physical
22 violence or the threat thereof.'" *Id.* at 1086 (quoting *Brooks v. City of San Mateo*, 229
23 F.3d 917, 926 (9th Cir. 2000); *Herberg v. Cal. Inst. of the Arts*, 101 Cal. App. 4th 142,
24 151 (2002)).

25 Accepting Plaintiff's allegations as true for purposes of this Motion, those
26 pertaining to Guerrero and the noose alone are without doubt extremely severe and a
27 threat of physical violence. Unlike *Henry*, where the plaintiff failed to "provide[] evidence
28 that the noose was directed at him personally (either by being placed in his personal

work area such as his locker, or containing a note or a picture indicating that he was the target of the display),” 37 F. Supp. 3d at 1086, Guerrero’s actions were clearly directed at Plaintiff when he presented the noose to him, pretended to hang himself with it, and said, “This is for you.” If “a single display of a noose [can be] sufficient to defeat summary judgment[,]” id. (collecting cases), then it is certainly enough to defeat a Rule 12(b)(6) motion to dismiss. Therefore, Moving Defendants’ Motion to Dismiss this claim as to Guerrero is DENIED.

3. ADM Corporate Defendants

Moving Defendants rely on the same arguments pertaining to Guerrero above in seeking dismissal of this claim against the ADM Corporate Defendants. Because the Court finds that Plaintiff has alleged a viable FEHA harassment claim against Guerrero, it follows that the claim should proceed against the ADM Corporate Defendants as well. Accordingly, Moving Defendants’ Motion to Dismiss on this ground is DENIED.

C. Fourth Claim for Relief: Retaliation in Violation of FEHA Against Moving Defendants

1. Individual Managers and Guerrero

Moving Defendants argue that Plaintiff can only pursue his FEHA retaliation claim against his employer, meaning that there is no individual liability for supervisors or other employees. See Moving Defs.’ Mot., at 13–14, 17. Plaintiff does not address this contention in his Opposition brief but in any case, Moving Defendants are correct. See Jones v. Lodge at Torrey Pines P’ship, 42 Cal. 4th 1158, 1173 (2008) (holding that “the employer is liable for retaliation under [FEHA], but nonemployer individuals are not personally liable for their role in that retaliation.”). Because the law is clear and Plaintiffs did not oppose this contention, leave to amend would be futile. The Motion to Dismiss this claim against the Individual Managers and Guerrero is thus GRANTED without leave to amend.

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2. ADM Corporate Defendants

Moving Defendants seek to dismiss this claim against the ADM Corporate Defendants on the same grounds as the discrimination and harassment claims above. See Moving Defs.' Mot., at 22. Because the Court finds that Plaintiff has stated viable discrimination and harassment claims against the ADM Corporate Defendants, their Motion to Dismiss the FEHA retaliation claim fails for those same reasons is thus DENIED.

D. Fifth Claim for Relief: Failure to Prevent and Cure Harassment and Discrimination in Violation of FEHA Against ADM Corporate Defendants

Moving Defendants argue that because "Plaintiff's alleged claims of discrimination and harassment are legally deficient[,] [f]or this reason alone, Plaintiff's failure-to-prevent claim will not succeed." Id. As previously stated, the discrimination and harassment claims are proceeding against the ADM Corporate Defendants and Moving Defendants have not offered any alternative argument as to why this claim should be dismissed. The Motion to Dismiss the Fifth Claim for Relief is therefore DENIED.

E. Amendment

In his Opposition brief, Plaintiff states that he "could plead additional facts about circumstances occurring after the events pled in the first complaint, including that plaintiff was terminated as a result of his race and as retaliation, filed a subsequent DFEH complaint about the termination, and has suffered and continues to suffer injuries." Pl.'s Opp'n, at 10. If he so desires, Plaintiff is directed to file a motion for leave to amend the Complaint to add such claims as set forth below.


CONCLUSION

For the reasons set forth above, Moving Defendants' Motion to Dismiss, ECF No. 32, is GRANTED in part and DENIED in part. The Third Claim for Relief as to the Individual Managers is DISMISSED with leave to amend. The Fourth Claim for Relief as

1 to the Individual Managers and Guerrero is DISMISSED without leave to amend.
2 Moving Defendants' Motion is otherwise DENIED. Not later than thirty (30) days after
3 the date this Memorandum and Order is electronically filed, Plaintiff may (but is not
4 required to) file either (1) an amended complaint consistent with this Memorandum and
5 Order, or (2) a motion for leave to amend the Complaint as indicated in the immediately
6 preceding section. If a motion for leave to amend is filed, Plaintiff need not file an
7 amended complaint along with it. Following the Court's disposition of the motion for
8 leave to amend, it will permit Plaintiff additional time to file an amended complaint
9 consistent with the foregoing. If, however, neither an amended complaint nor a motion
10 for leave to amend is timely filed, the claims dismissed by virtue of this Memorandum
11 and Order will be deemed dismissed without leave to amend upon no further notice to
12 the parties.

13 IT IS SO ORDERED.

14 Dated: July 19, 2023

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16 MORRISON C. ENGLAND, JR.
17 SENIOR UNITED STATES DISTRICT JUDGE
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